IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1562

DRESSER INDUSTRIES, INC.,
Petitioner

v.

EMRA JOSEPH BONHAM,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AND

APPENDICES

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

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Petitioner, Dresser Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 27, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania is printed in Appendix A hereto and is reported at 424 F. Supp. 891. The opinion of the United States Court of Appeals for the Third Circuit is printed in Appendix B hereto and is reported at 569 F.2d 187.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 27, 1977. A

timely Petition for Rehearing was denied on February 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether timely compliance with the notice-of-intent-to-sue requirement [29 U.S.C. §626(d)] is a jurisdictional prerequisite to a civil action under the Age Discrimination in Employment Act (29 U.S.C. §621 *et seq.*).

STATUTE INVOLVED

This case involves the interpretation and application of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*. The text of the pertinent portion of that statute [29 U.S.C. §626(d)] is set forth below:

"(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."

STATEMENT OF THE CASE

Respondent Emra Joseph Bonham ("Bonham") filed an action on August 20, 1976 in the United States District Court for the Western District of Pennsylvania against his former employer, a division of Dresser Industries, Inc. ("Dresser"). In Count One[1] of his Complaint, Bonham alleged that the termination of his employment as Manager—Factory Accounting of Harbison-Walker Refractories, Division of Dresser Industries, Inc. at the age of 46 violated the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (the "Act"). Federal question jurisdiction was alleged under the Act.

Dresser moved to dismiss Count One on the grounds that the district court lacked subject matter jurisdiction because of Bonham's failure to file timely charges with both the federal and the Pennsylvania authorities under the Act's notice-of-intent-to-sue requirements. The district court, treating Dresser's motion as a motion for summary judgment, granted the motion. Bonham appealed to the United States Circuit Court of Appeals for the Third Circuit, which reversed the granting of the summary judgment on Count One, holding that the notice-of-intent-to-sue requirements found in the Act were not "jurisdictional" but rather were in the nature of a statute of limitations.

The district court had determined that Bonham's employment with Dresser was terminated on October 31, 1975 and the court of appeals affirmed that determination. It is admitted by Bonham in his Complaint that his "statutory notices" to the federal and Pennsylvania authorities were not mailed until June 16, 1976, some 229 days after his termination.

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[1]The issue presented to this Court involves only Count One of the Complaint.

The Act imposes upon private litigants certain procedural requirements, including the requirement found at 29 U.S.C. §626(d)(1) that a notice-of-intent-to-sue be served upon the Secretary of Labor or his designee "within one hundred and eighty days after the alleged unlawful practice occurred...."[2] Thus, Bonham failed to comply with that procedural requirement. However, the Third Circuit Court of Appeals held that such failure would not "necessarily" foreclose Bonham's action, unless "the 180-day requirement is viewed as strictly 'jurisdictional' and not subject to tolling or similar equitable modifications." The circuit court then held that the 180-day notice requirement is not jurisdictional, but rather is in the nature of a statute of limitations. Accordingly, Count One was remanded to the district court to determine whether or not facts existed to justify a tolling of the 180-day notice requirement or an equitable modification thereof.[3]

The instant Petition for Writ of Certiorari is filed in order to present to this Court the question of whether or not the aforesaid notice requirement is jurisdictional.

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[2]The act also imposes a procedural requirement of notification to state authorities, if applicable. 29 U.S.C. §633(b). However, because of the nature of the holding in the court below, Bonham's failure to meet that requirement is not relevant to the issue presented to this Court.

[3]The circuit court held this to be a question of fact "which must be determined by the district court in the first instance". Bonham had claimed (i) that he was unaware of his rights under the Act and never saw the required statutory notice posted on the premises; and (ii) that he had written a letter to the President of Dresser in Dallas, Texas, requesting a position on the "headquarters staff", to which the President had responded by declining the suggestion but telling Bonham that an aide would be in contact with him if there were other opportunities at Dresser.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW OF THE THIRD CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME ISSUE.

In holding that the notice requirement is not jurisdictional, the court below relied upon the decision of the Tenth Circuit Court of Appeals in *Dartt v. Shell Oil Company*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 46 U.S.L.W. 4021 (U.S. Nov. 29, 1977). However, every other circuit ruling on the issue has found timely compliance with §626(d) to be a jurisdictional prerequisite to the maintenance of a private action under the Act. FIFTH CIRCUIT: *Clark v. West Chemical Products, Inc.*, 557 F.2d 1155 (5th Cir. 1977); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975); and *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974). SIXTH CIRCUIT: *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); and *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975). EIGHTH CIRCUIT: *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975); *Cf. Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975).

Indeed, prior to its decision in the instant case, the Third Circuit Court of Appeals had stated in at least three cases that the §626(d) notice requirement was jurisdictional. *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977); *Goger v. H. K. Porter Company, Inc.*, 492 F.2d 13 (3d Cir. 1974); and *McGarvey v. Merck and Co., Inc.*, No. 73-1558 (3d Cir., filed Mar. 12, 1974).

II. THE QUESTION OF FEDERAL LAW PRESENTED IS EXTREMELY IMPORTANT IN THE LITIGATION OF CASES ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Federal courts and attorneys practicing in the age discrimination area are well aware of the volume of cases arising under the Act which have posed procedural questions for resolution by the courts. The question of whether or not the procedural prerequisites to a civil action under the Act are jurisdictional is fundamental to most of those cases. The issue has been before courts of appeals at least twelve times (see *supra*) and district courts on occasions so innumerable that they defy brief citation here. Yet the conflict remains among the courts of appeals, and it has not yet been settled by this Court. The issue was before this Court in the *Dartt* case, but remained undecided by an equally divided court, with Mr. Justice Stewart taking no part in the consideration or decision of the case. 46 U.S.L.W. 4021 (U.S. Nov. 29, 1977).

III. THE DECISION BELOW OF THE THIRD CIRCUIT COURT OF APPEALS IS BELIEVED TO BE ERRONEOUS AND THE CONFLICTING DECISIONS OF THE OTHER COURTS OF APPEALS REFERENCED ABOVE ARE BELIEVED TO BE CORRECT.

The language of the Act, its legislative history, and legal precedent all mandate a conclusion that the notice requirement of §626(d) is jurisdictional and, thus, that failure to file such a timely notice is fatal to the action. Unlike a statute of limitations, which can be subject to tolling, waiver and other equitable considerations, a jurisdictional defect cannot be

waived, nor can it be cured even with consent of the parties. *Cf. Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975). If a jurisdictional prerequisite is not met, an essential condition of liability is lacking and the court is deprived of subject matter jurisdiction.

Congress clearly indicated that timely compliance with §626(d) was jurisdictional when it stated that "No civil action may be commenced" unless the notice requirement of the section was met and when it referred to the requirement as a "condition precedent" to the maintenance of a private civil action. 113 Cong. Rec. 31250, 34748. When statutory language is clear and unambiguous, it must be held to mean what it plainly says, because such clear statutory language is the best evidence of what the Congress intended. *Caminetti v. U.S.*, 242 U.S. 470 (1917). Here the statute clearly requires that the "notice of intent to file such action . . . shall be filed within one hundred and eighty days . . . ."

Although it is not necessary to refer to legislative history, because the statutory language of §626(d) is conclusive [*Ex Parte Collett* 337 U.S. 55, 61 (1949)], an examination of the legislative history supports the conclusion that timely compliance with its requirements is a jurisdictional prerequisite to suit. The 180-day requirement originally appeared in the Senate bill, was deleted by the House, restored by the Senate, and finally accepted by the House. Thus, Congress attached significance to the requirement, enacting only one limited exception to it, allowing an extension for 120 days where an individual first sought relief from a state agency which enforced an age discrimination law. 29 U.S.C. §626(d)(2).[4] There were numerous legitimate reasons for Congress to have so circumscribed the private right of

[4]The courts below each held that Bonham could not invoke the extended 300-day period because of his failure to make a timely filing with the Pennsylvania Human Relations Commission.

action, including encouragement of case settlements and provision for administrative remedies through the Department of Labor.

In the analogous setting of a Title VII case in which the employee-plaintiff urged the allowance of a "slight delay" beyond the statutory notice period, this Court stated:

> "But the principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay ... equally acceptable. In defining Title VII's *jurisdictional* prerequisites 'with precision' [citation omitted], Congress did not leave to courts the decision as to which delays might or might not be 'slight'". *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976) (emphasis added).

This Court also referred to the analogous Title VII procedural prerequisites as *jurisdictional* in the case of *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EMRA JOSEPH BONHAM,
Plaintiff
vs.
DRESSER INDUSTRIES, INC.
a corporation,
Defendant

Civil Action No. 76-1067

OPINION

BARRON P. MCCUNE, *District Judge*
December 28, 1976.

This action arises under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* (the Act) and concerns an act of alleged age discrimination by the defendant, Dresser Industries, Inc. (Dresser), against plaintiff, a former employee. Plaintiff has filed a two-count complaint, alleging in Count I a violation of the Act and basing jurisdiction upon §626(c)[1] of the Act and 28 U.S.C. §1331. In Count II, plaintiff alleges a breach of an employment contract under Pennsylvania law, said to arise out of the same factual background as Count I, invoking this court's diversity jurisdiction. Presently before this court is the defendant's motion to dismiss both counts of plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6) respectively of the Federal Rules of Civil Procedure.

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[1]Section 626(c) provides as follows:

> "(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."

The pertinent facts which comprise the basis for plaintiff's complaint may be briefly summarized. Plaintiff, a Pennsylvania resident, began his employment with the defendant[2] on March 18, 1968,[3] as a manager of profit planning in Dresser's Pittsburgh office. By April of 1974, plaintiff had attained the title of "Manager-Factory Accounting" and remained in this position until his discharge in 1975.

The actual date of plaintiff's discharge, however, has not been agreed upon by the parties. On the one hand, plaintiff contends that his employment with Dresser was "wrongfully and unlawfully terminated because of his age and for no other just cause" on December 31, 1975.[4] On the other hand, Dresser contends that plaintiff's employment was terminated on October 31, 1975,[5] because "his work performance was not up to the standards of the job[6]." At any rate, plaintifff was 46 years of age at the time of Dresser's alleged discriminatory action.[7]

Subsequent to October 31, 1975, plaintiff continued to receive regular bi-monthly paychecks throughout November and December of 1975. The last paycheck he

[2]It should be noted that plaintiff was employed in the Harbison-Walker Refractories, a division of Dresser Industries, Inc. As alleged in plaintiff's Complaint, paragraph 2, Dresser is a Delaware corporation, with its principal place of business in Dallas, Texas.

[3]See plaintiff's Complaint, paragraph 4, and the Affidavit of Louis J. Reeg, Jr. (Vice President-Industrial Relations of Harbison-Walker Refractories, Division of Dresser Industries, Inc.) in Support of Dresser's Motion to Dismiss Plaintiff's Complaint, Affidavit Exhibit "A", paragraph 3.

[4]See plaintiff's Complaint, paragraphs 5 and 11, and plaintiff's arguments in support of this date, to be presented, *infra*.

[5]See affidavit of Louis J. Reeg, Jr., *supra*, paragraphs 4-8, and Affidavit Exhibit "A" attached thereto.

[6]*Id.*, Affidavit Exhibit "B."

[7]Plaintiff's date of birth is January 3, 1929.

received, dated December 31, 1975[8], included a vacation payment to January 15, 1976. On January 13, 1976, plaintiff received a letter from Dresser which advised him of his rights under Dresser's Retirement Income Plan. The calculations pertinent to that plan were based on a termination date of December 31, 1975.[9] On January 15, 1976, plaintiff communicated with John V. James, President and Chief Executive Officer of Dresser Industries, Inc., regarding the possibilities of employment in another division of Dresser. His re-employment was denied by Dresser in communications dated January 19, 1976, and February 18, 1976.[10]

Thereafter, plaintiff went to Florida in an effort to find employment and returned to Pennsylvania in April of 1976. Plaintiff claims that it was at this time that he first became aware of his potential rights under the Act,[11] and consulted counsel in Butler, Pennsylvania. Then, on June 15, 1976, plaintiff consulted his present counsel who sent the required statutory notices by certified mail on June 16, 1976, to John O'Brien, Area Director for the United States Department of Labor,[12] and to the Pennsylvania Human Relations Commission.[13] These letters were received by the respective agencies on June 18, 1976. Subsequently, on August 20, 1976, plaintiff commenced this suit.

I. The Act

The Age Discrimination in Employment Act was enacted in 1967 for the express purpose of promoting

[8]See Plaintiff's Affidavit, paragraph 2, and Exh. "A" attached thereto.

[9]*Id.*, paragraph 3, and Exh. "B" attached thereto.

[10]*Id.*, paragraph 5, and Exhibits "D" and "E" attached thereto.

[11]*Id.*, paragraph 6.

[12]*Id.*, Exhibit "F".

[13]*Id.*, Exhibit "G".

"employment of older persons based on their ability rather than age," and prohibiting "arbitrary age discrimination in employment." 29 U.S.C. §621(b); *Burgett v. Cudahy Company*, 361 F. Supp. 617, 620 (D. Kan. 1973). The provisions of the Act were intended to cover employers,[14] employment agencies and labor organizations, 29 U.S.C. §623, and the prohibitions set forth in the Act are limited to individuals between the ages of 40 and 65 years of age, 29 U.S.C. §631. Exempted from the proscriptions of the Act are those discharges based on "good cause," 29 U.S.C. §623(f)(3).[15]

Although the primary responsibility for the enforcement of the Act is vested with the Secretary of Labor, the Act does permit an aggrieved individual to commence a civil action for legal or equitable relief, 29 U.S.C. §626(c). However, such an action by an individual is subject to strict procedural requirements which are set forth in 29 U.S.C. §626(d).[16]

Under §626(d), an individual is required to file a notice of intent to sue with the Secretary within 180 days after the alleged discriminatory act occurred. Then, §626(d) requires that the plaintiff wait sixty days following the notice of intent

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[14]The term, "employer," is defined at 29 U.S.C. §630(b).

[15]See footnote 6, *supra*.

[16]Section 626(d) reads as follows, in pertinent part:

"(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."

to sue before commencing suit. *Mizuguchi v. Molokai Electric Company*, 411 F. Supp. 590, 593 (D. Hawaii 1976). However, §626(d) further provides that if §633(b)[17] applies, the requisite notice of intent to sue must be filed within 300 days after the alleged discriminatory act occurred, or within 30 days after the receipt of notice of termination of state proceedings.

The act of alleged age discrimination took place in Pennsylvania. Pennsylvania is a State which has a law prohibiting age discrimination in employment[18] and establishing a State authority to grant or seek relief from such discrimination.[19] Pennsylvania law further requires that:

> "...Any complaint filed pursuant to this section must be so filed *within ninety days* after the alleged act of discrimination...." (emphasis supplied).[20]

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[17]Section 633(b) reads as follows, in pertinent part:

"(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated...."

[18]Section 955 of the Pennsylvania Human Relations Act, 43 P.S. §951, *et seq.*, prohibits discrimination in employment because of age. §955 reads as follows, in pertinent part:

"§955. *Unlawful discriminatory practices*

It shall be an unlawful discriminatory practice, ...

(a) For any employer because of the...age...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required...."

[19]43 P.S. §956 which establishes the Pennsylvania Human Rights Commission.

[20]43 P.S. §959.

Thus, there are three limitations periods relevant to the instant action: (1) the 180-day period for filing a notice of intent to sue with the Secretary under §626(d)(1); (2) the 300-day period for filing a notice of intent to sue with the Secretary, if §633(b) applies, under §626(d)(2); and (3) the 90-day state period for filing a complaint with the Pennsylvania Human Rights Commission under 43 P.S. §959.

II. Jurisdiction

A. The Date of the "alleged unlawful practice," i.e., the Date of Termination of Plaintiff's Employment.

The threshold question which this court must decide is when the "alleged unlawful practice occurred," i.e., on October 31, 1975, as the Defendant contends, or on December 31, 1975, as the plaintiff contends.[21] This determination is essential to our finding of whether plaintiff timely filed his notice of an intent to sue under the Act and Pennsylvania law. We will deal with the defendant's arguments in support of its contention first.

In support of Dresser's contention that October 31, 1975, was the date when the "alleged unlawful practice

[21]Since the defendant has moved to dismiss Count I of plaintiff's complaint for lack of jurisdiction over the subject matter pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and both parties have submitted affidavits upon which this court relies, defendant's motion to dismiss will be treated as one for summary judgment. See F.R.C.P. 12(b); *Doski v. M. Goldseker Co.*, 10 E.P.D. ¶10, 582, at p. 6404 (D. Md. 1975); *A. & M. Gregos, Inc. v. Robertory*, 384 F. Supp. 187, 193 n.16 (E.D. Pa. 1974).

Likewise, defendant's motion to dismiss Count II of plaintiff's Complaint, *infra.*, for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of The Federal Rules of Civil Procedure will be treated as a motion for summary judgment in view of the filing of affidavits by both parties. See: *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F. Supp. 881, 882 (E.D. Pa. 1964).

occurred,"[22] Dresser relies upon the Affidavit of Louis J. Reeg, Jr.,[23] which reveals that the following "occurred" on that date: (1) plaintiff's employment with Dresser was involuntarily terminated; (2) plaintiff was informed of said termination; (3) plaintiff never worked for Dresser subsequent to that date; and (4) plaintiff's employment was "officially" terminated for purposes of Dresser's personnel records and plaintiff's subsequent unemployment compensation application.

In response, plaintiff relies upon his own Affidavit and accompanying documents in support of his contention that December 31, 1975, is the effective date under the Act. These documents reveal that: (1) plaintiff continued to receive bi-monthly paychecks through December 31, 1975; (2) his rights under Dresser's Retirement Income Plan were based on a termination date of December 31, 1975; and (3) his Group Life Insurance remained in effect through December 31, 1975.

With regard to plaintiff's receipt of regular paychecks through December 31, 1975, Dresser argues that such payments merely represented severance pay equivalent to what his salary would have been through December 31, 1975, and, therefore, such payments do not establish that the "unlawful practice occurred" on the date plaintiff received

[22]It should be noted at this point that nowhere within the Act is the term, "unlawful practice," defined so as to indicate what factors may be considered in determining what constitutes such a practice. Further, our research reveals only one case to date, *Moses v. Falstaff Brewing Corporation*, 525 F.2d 92 (8th Cir. 1975), which discusses this issue under the Act. Therefore, our determination presents an issue of first impression in this Circuit.

[23]See footnotes 5 and 6, *supra*. Further, Dresser, in its brief, at page 5, argues that Reeg's Affidavit is uncontested. We disagree in light of plaintiff's submitted affidavit. See: *Smiley v. Gemini Investment Corporation*, 333 F. Supp. 1047 (W.D. Pa. 1971).

his last severance payment, i.e., December 31, 1975. On the contrary, Dresser argues, relying upon *Doski v. M. Goldseker Co., supra*, n.21, and *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975), that the "unlawful practice", if any, occurs on the date of the actual discharge even though plaintiff may receive severance payments thereafter. We agree. Although both *Doski* and *Olson* deal with alleged sex discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and both considered the issue of whether discrimination alleged by a former employer can constitute a "continuing" violation so as to toll the similar notice provisions of that Act, we find both courts' reasoning regarding when a "discharge" actually occurs to be persuasive in light of the definition of a "discharge" set forth in *In Re Public Ledger, Inc.*, 63 F. Supp. 1008, 1015 (E.D. Pa. 1945), rev'd 161 F.2d 762 (3d Cir. 1947):

> "...To discharge an employee is to remove him temporarily or permanently from employment....In order that there be a discharge by the employer, there must be some affirmative action taken by the employer. There must be some conduct on the part of the employer, indicating that he will no longer be bound by the contract of employment....There must also be an intention on the part of the employer to abrogate the contract, and there must be some communication of that intent by word or act to the employee."

See also: *Fredericks v. Georgia-Pacific Corporation*, 331 F. Supp. 422, 428-29 (E.D. Pa. 1971).

We believe that plaintiff's "discharge" occurred on October 31, 1975, since Dresser orally communicated this fact to plaintiff on that date, plaintiff never performed further services for Dresser subsequent to that date, and plaintiff's personnel record and unemployment compensation application both listed that date as the "official" date of

termination for Dresser's administrative purposes. The mere fact that plaintiff received severance pay until December 31, 1975, and pension benefits and life insurance were calculated through December 31, 1975, does not affect, in our opinion, the actual date when plaintiff's services were terminated by Dresser and he was effectively "discharged" from his employment. See: *Davis v. RJR Foods, Inc.*, 420 F. Supp. 930, 931 n.1 (S.D. N.Y. 1976).

Although not cited in plaintiff's brief, our research indicates only one case that discusses this issue and lends support to plaintiff's position, *Moses v. Falstaff Brewing Corporation, supra*, n.22. This court is, of course, not bound by the decision of the Eighth Circuit. However, we believe that our opinion is in accordance with the holding in that case.[24]

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[24]The facts presented in *Moses v. Falstaff Brewing Corporation, supra*, are somewhat similar to the facts presented here.

There, Falstaff advised plaintiff of her discharge from employment on November 12, 1973. Plaintiff did not perform further services for Falstaff subsequent to November 16, 1973. However, plaintiff was officially terminated by Falstaff, for administrative purposes on November 30, 1973, and was paid, apparently for accrued vacation time, through this date. Plaintiff filed a written notice of her intent to file suit with the Secretary of Labor on May 24, 1974.

Falstaff contended that November 12, when plaintiff was advised that she no longer had a job, or November 16, her last day of work, were the dates when plaintiff was "discharged". The acceptance of either date would have constituted untimely notice under the Act. Plaintiff, on the other hand, contended that November 30 was the effective date since her employment was terminated on that date for Falstaff's administrative purposes. Such date provided timely notice.

The issue presented was on which date did the "alleged unlawful practice" under the Act occur.

The court held that November 30 was the "crucial date" and, therefore, plaintiff fully complied with the Act's notice requirements. 525 F.2d at pages 94-95.

Our conclusion is in accordance with the Eighth Circuit's holding since here all of the above actions "occurred" on one day, October 31, 1975.

Therefore, we hold that the "alleged unlawful practice," 29 U.S.C. §626(d), occurred on October 31, 1975, and the statutory time periods begin to run from that date.

B. Plaintiff's Alleged Failure to Comply with the Statutory Requirements of 29 U.S.C. §§626(d) and 633(b), and 43 P.S. §959.

Since we have concluded that the "alleged unlawful practice," i.e., plaintiff's discharge, occurred on October 31, 1975, we next turn to Dresser's contention that since plaintiff did not file the required notice of intent to sue with the Secretary within 180 days after the alleged unlawful practice occurred,[25] plaintiff's complaint must be dismissed.

We are aware of the great weight of authority which supports Dresser's contention, and recognize that other district and circuit courts have uniformly held that the 180-day notice requirement of 29 U.S.C. §626(d)(1) is a jurisdictional prerequisite to filing an action under the Act.[26]

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[25]As Dresser points out in its brief, page 6, plaintiff's letter to the U.S. Department of Labor, dated June 16, 1976, was mailed 229 days after the October 31, 1975 discharge date.

[26]Fourth Circuit: *Raynor v. Great Atlantic & Pacific Tea Company, Inc.*, 400 F. Supp. 357 (E.D. Va. 1975); Fifth Circuit: *Edwards v. Kaiser Aluminum Chemical Sales, Inc.*, 515 F.2d 1195, 1199 (5th Cir. 1975); *Powell v. Southwestern Bell Telephone Company*, 494 F.2d 485 488 (5th Cir. 1974), reh. den. 498 F.2d 1402 (5th Cir. 1974); *Brohl v. Singer Company*, 407 F. Supp. 936, 938 (M.D. Fla. 1976); *Cochran v. Ortho Pharmaceutical Company*, 376 F. Supp. 302, 303 (E.D. La. 1971); Sixth Circuit: *Eklund v. Lubrizol Corp.*, 529 F.2d 247, 249 (6th Cir. 1976); *Rucker v. Great Scott Supermarkets*, 528 F.2d 393, 394 (6th Cir. 1976); *Ott v. Midland-Ross Corporation*, 523 F.2d 1367, 1370 (6th Cir. 1975); *Hiscott v. General Electric Company*, 521 F.2d 632, 633,34 (6th Cir. 1975); Ninth Circuit: *Oshiro v. Pan American World Airways, Inc.*, 378 F. Supp. 80, 82 (D. Hawaii, 1974); Tenth Circuit: *Law v. United Air Lines, Inc.*, 519 F.2d 170 (10th Cir. 1975).

Cf., Dartt v. Shell Oil Company, 539 F.2d 1256, 1259 (10th Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3435 (U.S. November 15, 1976) (No. 76-678).

Likewise, this principal [sic] has been followed in this District. See: *Balc v. United Steelworkers of America*, 6 E.P.D. ¶8948, at page 6039 (W.D. Pa. 1973). Therefore, we find that plaintiff's letter of June 16, 1976, notifying the Secretary of his intent to file an age discrimination action under the Act, which was sent 229 days after his alleged unlawful discharge, did not comply with the 180-day requirement of §626(d)(1) of the Act.

We thus turn to the question of whether plaintiff falls within the ambit of §626(d)(2) of the Act, where notice can be given within a 300-day period following an alleged unlawful practice.

Section 626(d)(2) affords its more liberal notice period only in those situations in which §633(b) of the Act is applicable. Section 633(b), as stated earlier, applies to those actions in which the alleged unlawful practice occurred in a state which has (1) a law prohibiting age discrimination in employment and (2) a state agency authorized to seek relief for individuals suffering age discrimination. Pennsylvania is a §633(b) state.[27]

Dresser contends that the more liberal 300-day notice period of §626(d)(2) is not applicable here since, before commencing suit in this court, plaintiff failed to file his complaint with the Pennsylvania Human Rights Commission within 90 days of October 31, 1975, as required by 43 P.S. §959, or at most, within the 180-day period set forth in §626(d)(1) of the Act, and, therefore, this failure is a jurisdictional bar to plaintiff's suit in this court.

In response, plaintiff argues that the Act does not require him to exhaust state remedies as a prerequisite to the

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[27]See footnotes 18 and 19 *supra*.

institution of a federal suit, citing *Goger v. H. K. Porter Company, Inc.*, 492 F.2d 13, 15 (3d Cir. 1974).[28]

This issue, namely whether a plaintiff is required to intially make a timely report to an appropriate state agency before commencing a federal action and whether failure to do so serves as a jurisdictional bar to plaintiff's action, has been considered by this Circuit on two prior occasions, and both of the applicable cases have been discussed by the parties in their respective briefs.

In *Goger v. H. K. Porter Company, Inc., supra*, New Jersey law required that age discrimination in employment complaints be filed within 180 days of the alleged act of discrimination. However, plaintiff never filed a complaint with the appropriate New Jersey state agency responsible for the elimination of unlawful discrimination in employment based on age prior to the institution of her federal suit. The central issue presented was thus, whether §663(b) requires an aggrieved individual to initially seek redress from the state agency before instituting suit in federal district court. The court addressing this issue stated:[29]

> "...[A]lthough the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does

[28]Plaintiff's argument which relies upon particular language stated by the Third Circuit at page 15 of the *Goger* opinion, *supra*, is misplaced in the context of that opinion and incorrectly responds to Dresser's jurisdictional argument. The pertinent language was explained in *Magalotti v. Ford Motor Company*, 418 F. Supp. 430, 433 (E.D. Mich. 1976). As the *Goger* court pointed out, although a plaintiff does not have to thoroughly exhaust state remedies before commencing suit in federal court (since under the Act a plaintiff could timely file *both* a federal claim, and a state claim within 90 days in accordance with state law) a plaintiff must nevertheless first seek relief from the appropriate state agency before filing a federal claim, absent equitable considerations.

[29]See footnote 28, *supra*.

> require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance. (492 F.2d at p. 15).
>
> • • •
>
> We...conclude that section 633(b) required [plaintiff] to seek relief from the appropriate New Jersey agency prior to instituting her suit in the federal district court." (492 F.2d at p. 16.).

However, the court nevertheless vacated an order of dismissal, despite the failure of the plaintiff to resort to the state agency prior to filing a federal action for age discrimination, on "equitable" grounds, because plaintiff had been misled by a Labor Department representative and there had been no prior reported cases on this jurisdictional point. The court stated:

> "...[W]e...consider equitable relief to be appropriate in view of the total absence...of any judicial decision construing section 633(b) during the period involved here and in view of the remedial purpose of the 1967 Act. *In the future*, however, *we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced.*" 492 F.2d at p. 17. (Emphasis supplied).

See also: *Sutherland v. SKF Industries, Inc.*, 419 F. Supp. 610, 612-13 (E.D. Pa. 1976).

In the second case, *McGarvey v. Merck & Co., Inc.*, 359 F. Supp. 525 (D. N.J. 1973), vacated without opinion, 493 F.2d 1401 (3d Cir. 1974), *cert. den.*, 419 U.S. 836, 95 S. Ct. 64, 42 L. Ed. 2d 63 (1974), although plaintiff timely field his notice of intent to sue with the Secretary of Labor under §626(d)(1), he failed to allege that he had filed a complaint with or commenced proceedings before the Pennsylvania Human Relations Commission pursuant to 43 P.S. §951, *et*

seq. In fact, plaintiff never filed with the state agency. On this basis, defendant contended that §633(b) of the Act barred plaintiff's action, relying upon cases interpreting 42 U.S.C. §2000e-5(c), an analogous provision of Title VII of the Civil Rights Act of 1964, to require primary resort to state remedies as a jurisdictional prerequisite to a suit under the Act.[30] The Court, accepting defendant's contention, dismissed plaintiff's complaint[31] stating:

> "Section 633(b) should be construed to mean that plaintiff must first attempt to utilize available state remedies before filing a complaint alleging discrimination based upon age.
>
> • • •
>
> Thus, it is the opinion of this Court that where substantial relief against alleged age discrimination is available under state law, 29 U.S.C. §633(b) requires the person aggrieved to pursue state remedies prior to filing a complaint with this Court. [*Citing Goger v. H. K. Porter Company, Inc., supra.*] Since plaintiff here has failed to allege or offered to establish prior resort to the appropriate state remedy, this Court lacks jurisdiction over the subject matter...." (359 F. Supp. at p. 528).

Both of these cases relied upon by the parties, however, have a distinguishable feature from the instant case in that the plaintiffs in those cases never applied to a state agency. Here, plaintiff did apply to the applicable state agency, but was 139 days late under 43 P.S. §959 and 49 days later under §626(d)(1) of the Act. See: *Gabriele v. Chrysler Corporation*, *supra* n.30, at page 668.

It is our conclusion, based upon the particular facts presented here and the language presented by the Third Circuit in *Goger* and *McGarvey*, that a plaintiff is required by §633(b) of the Act to initially commence an action with the appropriate state agency prior to instituting suit in federal district court and failure to do so constitutes a jurisdictional bar to a federal court action.[32]

We, therefore, hold that plaintiff's failure to file a complaint within 60 days after October 31, 1975, as required by 43 P.S. §959,[33] or within the shorter 180-day federal period[34] bars the instant action. Accordingly, Count I of plaintiff's complaint must be dismissed.

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[30]The similarity between Title VII of the Civil Rights Act, 42 U.S.C. §2000e-1, *et seq*., and the Age Discrimination in Employment Act, *supra*, has been recognized in numerous cases: First Circuit: *Skoglund v. Singer Company*, 403 F. Supp. 797, 801-02 (D. N.H. 1975); Third Circuit: *Goger v. H. K. Porter Company, Inc., supra*, at pages 15-16; *McGarvey vs. Merck & Co., Inc., supra*, at page 527; Fifth Circuit: *Woodford v. Kinney Shoe Corporation*, 369 F. Supp. 911, 914-915 (N.D. Ga. 1973); Sixth Circuit: *Gabriele v. Chrysler Corporation*, 416 F. Supp. 666, 667-68 (E.D. Mich. 1976); Eighth Circuit: *Moses v. Falstaff Brewing Corporation, supra*, at page 94; Ninth Circuit: *Curry v. Continental Airlines*, 513 F.2d 691, 696 (9th Cir. 1975); Tenth Circuit: *Dartt v. Shell Oil Company, supra*, at page 1259; *Burgett v. Cudahy Company, supra*, at page 620.

Cf., Vazquez v. Eastern Airlines, Inc., 405 F. Supp. 1353 (D. P.R. 1975).

[31]The Third Circuit vacated the district court's order of dismissal here presumably on the same ground that the *Goger* case vacated a dismissal.

[32]See also: *McGinley v. Burroughs Corporation*, 407 F. Supp. 903, 908 (E.D. Pa. 1975); *Vaughn v. Chrysler Corporation*, 382 F. Supp. 143 (E.D. Mich. 1974). *Cf., Curry v. Continental Airlines, supra*, n.30. *Contra, Skoglund v. Singer Company, supra*, n.30, at page 802; *Smith v. Jos. Schlitz Brewing Company*, 419 F. Supp. 770, 774 (D. N.J. 1976).

[33]See: *Gabriele v. Chrysler Corporation, supra*, which is factually on point with the case presented here.

[34]See: *Bertsch v. Ford Motor Company*, 415 F. Supp. 619, 621-22, 627 (E.D. Mich. 1976), wherein the court held that although plaintiff failed to comply with Michigan's 90-day limitations period due to lack of knowledge and belated attempts at compliance, a federal action was not precluded since plaintiff did file a notice of intent to sue within §626(d)(1)'s 180-day period.

III. Defendant's Alleged Breach of Plaintiff's Employment Contract

In Count II of plaintiff's complaint, plaintiff alleged a breach of an oral contract of employment under Pennsylvania law,[35] invoking this court's diversity jurisdiction. In particular, plaintiff alleged that his employment with Dresser was "wrongfully and unlawfully terminated...because of [his] age and for no other just cause...[thereby]...contrary to the public policy of...Pennsylvania."

In response, Dresser contends that plaintiff failed to allege, in his complaint, any duration or tenure of an alleged employment contract, and, therefore, absent such an allegation, Pennsylvania law states that such contract may be terminated *at will* by either party. In support, Dresser relies upon the principles set forth in *Jackman v. Military Publications, Inc.*, 234 F. Supp. 217, 218 (E.D. Pa. 1964), *aff'd* 350 F.2d 383, 385 (3d Cir. 1965), and *McKinney v. Armco Steel Corporation*, 270 F. Supp. 360, 362 (W.D. Pa. 1967).

In *Jackman*, the court, citing *Cummings v. Kelling Nut Co.*, 368 Pa. 448, 451-52, 84 A.2d 323, 325 (1951), stated the Pennsylvania rule concerning the termination of employment contracts as follows:

> "The general rule is that when a contract provides that one party shall render services to another or shall act as an agent, or shall have exclusive sales rights within certain territory, but does not specify a definite time or

[35] A contract of employment is governed as to its construction and effect by the law of the place where the complaint was made, it having been made when and where the last act necessary for its formation has taken place. *Shipley v. Pittsburgh & L. E. R. Co.*, 83 F. Supp. 722, 739 (W.D. Pa. 1949). Since this contract was executed in Pennsylvania, Pennsylvania law therefore controls.

prescribe conditions which shall determine the duration of the relation, the contract may be terminated by either party at will. (Citation omitted). The burden is on the plaintiff in such cases to overcome the presumption by showing facts and circumstances establishing some tenure of employment...."[36]

In *McKinney*, the court stated:

> "Absent a contract of employment for a definite term or unless restrained by some labor union contract, an employer may discharge an employee at will, anytime, without cause or reason, or for any reason he believes justifies the discharge, even though the employee believes the reason to be false. In such cases no action for damages can be maintained for wrongful discharge."[37]

Plaintiff, in response, relies exclusively upon *McGinley v. Burroughs Corporation, supra*, n. 32, at page 910. In *McGinley*, the court noted that discrimination by an employer on account of age is against the public policy of Pennsylvania, 43 P.S. §952(b). The court then stated:

> "Accepting plaintiff's allegation that he was discharged by the defendant on account of age as being true, then clearly such action is illegal because it is contrary to the public policy of Pennsylvania. Any contract, including a contract at will, which is terminated for a reason contrary to the public policy of Pennsylvania gives rise to a claim for breach of contract."

[36] See also: *Green v. Medford Knitting Mills, Inc.*, 408 F. Supp. 577, 579 (E.D. Pa. 1976).

[37] *McKinney* was cited in the Appendix Opinion to *deMarrais v. Community College of Allegheny County*, 407 F. Supp. 79, 82 (W.D. Pa. 1976). See also: *Hanna v. R.C.A. Service Company*, 336 F. Supp. 62, 64 (E.D. Pa. 1971); *Weir v. Hudson Coal Co.*, 99F. Supp. 423, 426 (M.D. Pa. 1951).

Plaintiff urges this court to accept the reasoning presented in *McGinley* and adopt it in the factual context presented here.

Our research reveals no other case that addresses this particular issue. Thus, we are presented with the difficult situation of reconciling two different theories of argument advanced by the parties in their respective briefs, both of which accurately state the position of existing law, but which necessarily culminate in a diametrically opposite result.

As a starting point for our analysis, we must consider plaintiff's employment situation with Dresser. From our review of the record presented it is apparent that no formal, express written contract of employment was entered into by the respective parties, either at the time of plaintiff's hiring[38] or at a time prior to plaintiff's discharge. Further, no evidence has been presented by plaintiff which would indicate that his oral contract or employment was to last for any definite length of time. Thus, we find that plaintiff's employment was "at will", and, under applicable Pennsylvania law, subject to termination at any time by either party. Accordingly, due to the nature of the contract involved, plaintiff would be barred from maintaining an action for damages for his alleged wrongful discharge unless, of course, the applicable age discrimination statutes or the *McGinley* case provide some means for relief.

It is clear that prior to the enactment of the Pennsylvania Human Relations Act of 1961 and the Federal Age Discrimination in Employment Act of 1967, plaintiff could not have maintained an action for breach of contract or wrongful discharge against Dresser, absent a contract of employment for a definite term, which, as stated above, is not presented by the instant facts. With the enactment of these statutes, a discharged employee could commence a

[38]See plaintiff's complaint, §11, and footnote 3, *supra*.

suit in federal court[39] when he believed that his discharge was purely discriminatory and based upon his age.[40] However, the statutes, by their clear language, were designed and intended to protect only against various types of *discrimination*[41] which occur in employment relationships, and not merely to attack various discharges where age may have been a factor in the employer's decision, but some form of discrimination is not presented.

Therefore, under the applicable statutes, we find that, notwithstanding the pertinent filing requirements, some form of discrimination has to be alleged by an aggrieved plaintiff in order for him to recover thereunder. A thorough review of the record before us fails to establish any basis for an age *discrimination* claim by plaintiff since we note a clear absence of any evidence in either plaintiff's complaint or his supporting affidavit which tends to show that younger, and perhaps as equally qualified, employees were hired as

[39]The Pennsylvania Act, 43 P.S. §951, *et seq.*, does not have a provision similar to §626(c) of the Federal Act, 29 U.S.C. §626(c), which permits an aggrieved individual to commence a civil action for legal or equitable relief. In this respect, all civil actions based upon alleged age discrimination can be filed in federal court, subject to the applicable state filing requirements. See footnote 20, *supra*.

[40]29 U.S.C. §§621, 623, 633; 43 P.S. §§952, 953, 955. See also: *McIlvanie v. Pennsylvania State Police*, 6 Pa. Commonwealth Ct. 505, 511, 296 A.2d 630, 633 (1972), *aff'd* 454 Pa. 129, 309 A.2d 801 (1973), *app. dis'm.* 415 U.S. 986, 94 S. Ct. 1583, 39 L. Ed. 2d 884 (1974).

[41]The term, "Discrimination", has been defined under the Civil Rights Act in the context of a sex discrimination case and is, therefore, equally applicable here. (See footnote 30, *supra*). That definition reads as follows:

> " 'Discrimination' . . . is in general a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored."

Baker v. California Land Title Company, 349 F. Supp. 235, 238-39, (C.D. Cal. 1972), *aff'd.* 507 F.2d 895 (9th Cir. 1974), *cert. den.* 422 U.S. 1046, 95 S. Ct. 2664, 45 L. Ed. 2d 699 (1975). See also: Civil Rights Act of 1964, §703(a)(1), 42 U.S.C. §2000e-2(a)(1).

replacements for plaintiff's former position. In this respect, plaintiff's reliance upon *McGinley v. Burroughs Corporation, supra*, is clearly distinguishable, since in that case evidence was submitted by plaintiff which revealed that younger employees were hired by the defendant company, allegedly with the intention that these employees were to be replacements for plaintiff subsequent to his discharge. 407 F. Supp. at pages 906, 910.

We believe that the logic presented by the court in the *McGinley* decision was intended to carve out an exception to the uniform Pennsylvania rule regarding the termination of "at will" employment contracts. Essentially, the reasoning presented in *McGinley* states that if some sort of discrimination in discharge can be shown to exist, then such action by an employer is indeed illegal, since it is violative of public policy, and, therefore, such action would give rise to a breach of contract claim. However, we find that the exception presented in *McGinley*, and relied upon exclusively by plaintiff, in support of Count II of his complaint, is not presented by the instant facts. Therefore, we decline to accept the principle set forth in *McGinley* as applicable to the factual averments present here.

Further, we respectfully disagree with the *McGinley* court's holding that an illegal discharge, i.e., a discriminatory discharge, gives rise to a breach of *contract* claim, whether the discharge be under an "at will" employment contract, or otherwise. Rather, we prefer to say that a discriminatory discharge from a job held at will gives rise to a *civil rights* claim although it may sound in contract. We say this because there is no actual contract presented binding an employer to retain an employee at will for any length of time.

We thus conclude that if an employee can allege a discriminatory discharge from employment on account of age, and timely file the appropriate notices set forth in the

respective Acts, an appropriate action under the age discrimination statutes can be commenced. Likewise, if the employee can present evidence supporting such a claim of discrimination, a breach of "contract" action may lie within the exception to the Pennsylvania law concerning the termination of "at will" employment contracts as set forth in *McGinley*.

Since plaintiff has failed to meet both of the requirements set forth above, and has failed to set forth any evidence which establishes that his oral employment contract was to last for any definite length of time, Count II of plaintiff's complaint must be dismissed and defendant's motion for summary judgment is, therefore, granted.

An order in accordance with this opinion, follows.

...../s/ BARRON P. MCCUNE....
Barron P. McCune
United States District Judge

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 77-1292

EMRA JOSEPH BONHAM,
Appellant,

v.

DRESSER INDUSTRIES, INC.,
a Corporation,
Appellee.

(D.C. Civil Action No. 76-1067)

APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 20, 1977

Before VAN DUSEN and ROSENN, *Circuit Judges*, and STERN,* *District Judge*

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*Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

(Filed December 27, 1977)

STERN, *District Judge*

Appellant Emra Joseph Bonham filed an action in the United States District Court for the Western District of Pennsylvania against his former employer, Dresser Industries, Inc. The complaint was framed in two counts. Count I, based on the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 *et seq.*, charged that Bonham's employment with Dresser was unlawfully terminated on December 31, 1975 "because of his age and for no other just cause." Count II invoked the court's diversity jurisdiction and charged that the termination was a breach of his oral contract of employment actionable under state common law.

Dresser moved to dismiss Count I for lack of subject matter jurisdiction on the ground that plaintiff had failed to file timely charges with both federal and state authorities. Dresser also moved for dismissal of Count II for failure to state a claim. The district court, treating Dresser's motion as a motion for summary judgment, granted judgment for Dresser on both counts.

In granting summary judgment on Count I, the district court determined that the alleged unlawful practice occurred on October 31, 1975, that the federal 180-day period for filing a charge with the Secretary of Labor ran from that date, that Bonham's June 16, 1976 notice to the Secretary of Labor was therefore untimely, and that Bonham's failure to file within 180 days of October 31 was a jurisdictional defect. The district court held, alternatively, that Bonham's ADEA claim was barred for failure to file a charge with state authorities within 90 days. In granting summary judgment

on Count II, the district court held that the complaint failed to state a claim under Pennsylvania law. We reverse the district court's grant of summary judgment on Count I of the complaint; we affirm its disposition of Count II.

Bonham, who was in his late forties when the events giving rise to this litigation took place, began working for Dresser Industries in 1969. Through a series of promotions, he reached the position of "manager-factory accounting" at an annual salary of $28,500.00

The affidavit of Dresser's vice president states that Bonham's employment terminated on October 31, 1975, that Bonham was informed of the termination on or before October 31, 1975, and that Bonham performed no services as a Dresser employee after October 31, 1975. Bonham's personnel card, which Dresser made part of the record, indicates that Bonham was terminated on October 31; this document states that the termination was "by mutual consent."[1]

Bonham argued here and before the district court that the termination occurred on December 31, 1975. His affidavit states that he was informed on October 31 that he *would be* terminated as of December 31, 1975, that he was paid his regular salary, periodically from October 31 through December 31, 1975, that the company kept his

[1]App. 10a-11a. The company took the position before the district court, for purposes of its motion, and before this Court, for purposes of the appeal, that Bonham was fired. Indeed, central to its argument is its contention that Bonham was told that he was fired on a date certain. Nevertheless, the company apparently still intends to take the position that the employment relationship was severed consensually.

We sound a note of caution about a grant of summary judgment in circumstances where the facts are unclear and a fuller development of the facts may serve to clarify the application of the law. *See Palmer v. Chamberlin*, 191 F.2d 532, 540 (5th Cir. 1951).

insurance coverage effective through December 31, and that he was advised, in writing by the company, that his retirement benefits would be calculated on the basis of a December 31 termination date.[2] However, he does not dispute that October 31, 1975 was the day he was told of his termination and that it was the last day he actually worked.

In January of 1976, Bonham wrote directly to the president of Dresser Industries requesting that he be placed in a different division of the company.[3] On January 19, Dresser's president advised Bonham that he had made arrangements to review other opportunities for Bonham within the company.[4] On February 18, 1976, however,

[2]App. 14a-19a.

[3]

January 15, 1976

xxx
Dear Mr. James:

. . .

I do not see how Dresser, the prime user of direct costs, can afford to lose a man with 17 years experience in the design and installation of direct cost systems and with knowledge and training in other Dresser financial techniques. Many companies have extablished [sic] a headquarters staff job as a COST CONSULTANT with the responsibility of reviewing existing cost systems to maintain them in compliance with company policy; to advise and assist divisions in the design and installation of new systems; and to see that related inventory controls are maintained.

• • •

Harbison has made my termination effective January 15 and I wanted to write before I accepted other employment. I know you have recognized the difference in Harbison's profit picture as a result of financial control and may have a use for me elsewhere to accomplish the same result.

Sincerely yours,
Joseph Bonham

App. 20a

[4]

xxx January 19, 1976
Dear Mr. Bonham:
I have received your letter of January 15 regarding other possible opportunities for employment within Dresser. I do not feel that we should

(continued)

Bonham was notified that there would be no position for him within Dresser Industries.

On June 16, 1976,—229 days after the October 31 date urged by the company, 169 days after the December 31 date urged by Bonham, and 118 days after Bonham received word from Dresser that there were no other positions at Dresser for him—Bonham gave notice to the Secretary of Labor of his intention to sue. On the same date, he notified the Pennsylvania Human Relations Commission of his allegedly wrongful discharge.

The Age Discrimination in Employment Act of 1967 was designed to promote the employment of persons between the ages of 40 and 64 by prohibiting discriminatory employment decisions based on age. See 29 U.S.C. §631. The substantive provisions of the Act are enforceable both by governmental actions and by private suits brought by aggrieved persons. Prior to the commencement of any action, the Secretary of Labor must be given an opportunity to eliminate the allegedly discriminatory practice through informal methods. 29 U.S.C. §626(d). In order to provide the Secretary this opportunity to attempt conciliation, an aggrieved person must notify the Secretary that he intends to sue 60 days before commencing an action.

The Act imposes two additional procedural requirements on private litigants. Section 626(d)(1) provides that the 60-day notice of intent to sue must be filed with the Secretary of Labor "within one hundred and eighty days

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add to the Headquarters staff, the position as Cost Consultant, as you suggested. However, I have asked Bob Shopoff to review what other opportunities there might be in Dresser. After Bob has completed his review, he will be in touch with you directly.

Sincerely,
/s/ J. V. James

App. 21a

after the alleged unlawful practice occurred...." Section 633 provides, in pertinent part:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 ... before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: ...

Both of these procedural requirements are at issue in this lawsuit.

Section 626(d)'s 180-day filing requirement begins to run from the date of the "alleged unlawful practice." At issue here is when that unlawful practice occurred. The litigants agree that the alleged wrongful act was Bonham's termination, but Bonham argues that that occurred on December 31, the date of his last paycheck and the termination of all company benefits. On these facts, we agree with the district court that the termination took place on October 31, 1975, the date urged by Dresser.

Although no simple rule can be formulated which will deal adequately with all factual situations, where unequivocal notice of termination and the employee's last day of work coincide, then the alleged unlawful act will be deemed to have occurred on that date, notwithstanding the employee's continued receipt of certain employee benefits such as periodic severance payments or extended insurance coverage. See *Davis v. RJR Foods, Inc.*, 420 F. Supp. 903, 931 n.1 (S.D. N.Y. 1976), *aff'd without opinion*, 556 F.2d 555 (2nd Cir. 1977); *Doski v. M. Goldseker Co.*, 11 FEP Cas. 468 (D. Md. 1975), *aff'd in relevant part and remanded*, 539 F.2d 1326, 1328 n.3 (4th Cir. 1976); *Payne v. Crane Co.*, 560 F.2d 198, 199 (5th Cir. 1977) (per curiam).

We reject the rule propounded in *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), which looks exclusively to the company's official termination date as reflected in company records. Because, as in the case *sub judice*, a company may use different termination dates for different purposes, the *Moses* rule does not adequately resolve the issue. Moreover, we would be wary of any approach which determines the timeliness of an employee's suit against his employer solely on the basis of records which are within the exclusive control of the employer. On the other hand, we would also view with disfavor a rule that penalizes a company for giving an employee periodic severance pay or other extended benefits after the relationship has terminated rather than severing all ties when the employee is let go.

The ADEA is humanitarian legislation which must be interpreted in a humane and commonsensical manner; its 180-day filing period is very short. An employee should not be required to take action to enforce his rights while he continues to work and while his employment status is at all uncertain.

The 180-day period does not begin to run until the employee knows, or as a reasonable person should know, that the employer has made a final decision to terminate him, and the employee ceases to render further services to the employer. Until that time he may have reason to believe that his status as an employee has not finally been determined, and should be given an opportunity to resolve any difficulty while he continues to work for the employer. In any event, a terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination against his employer as long as he is still working even though he has been told of the employer's present intention to terminate him in the future.

We emphasize that this test is not subjective, and, on the facts of this case we believe that the district judge was correct in ruling that the alleged unlawful practice occurred on October 31, 1975 when Bonham ceased to perform services for Dresser Industries with knowledge and on notice that he was not to return to his job.

Although we agree that October 31, 1975 was the date of the alleged unlawful practice, we do not agree that the action is necessarily foreclosed by Bonham's failure to file within 180 days. Bonham's action is barred only if the 180-day requirement is viewed as strictly "jurisdictional" and not subject to tolling or similar equitable modifications.[5] While it is true, as the district court recognized, that some authority favors the view that the 180-day requirement is a jurisdictional prerequisite to suit, see *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974), the decisions are not all in accord. The Fifth Circuit, while terming the requirement "jurisdictional", has nevertheless found equitable reasons for tolling or waiving. See *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975).

In *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 46 U.S.L.W. 4021 (U.S. Nov. 29, 1977), the Tenth Circuit held that the 180-day rule is merely in the nature of a statute of limitations and therefore subject to possible tolling and estoppel. We believe that *Dartt* represents the better view.

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[5] We reject the proposition that Bonham may invoke the extended 300-day period of section 626(d)(2) notwithstanding his failure to make a timely state filing. See *infra* at 9-10. Any other rule would mean that plaintiff could intentionally wait until after the state filing period had run, and then take advantage of the lengthier federal filing period. This was surely not the intent of Congress. *Cf. DuBois v. Packard Bell Corp.*, 470 F.2d 973 (10th Cir. 1972)

We have searched the ADEA's legislative history for indications as to whether Congress intended that the 180-day requirement be a jurisdictional prerequisite or merely a statute of limitations. We have found nothing there which answers the question. Nor do we find guidance under Title VII. Although the Supreme Court has characterized Title VII's analogous 180-day filing requirements as "jurisdictional", see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (dictum), it has nevertheless addressed the question whether the period would be tolled during the pendency of grievance or arbitration procedures. See *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). Thus, Title VII precedent provides no clear path.

Our conclusion that the 180-day period is not jurisdictional is based on our view of the design and purposes of the Age Discrimination in Employment Act. This Court has recognized that the ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. *Goger v. H. K. Porter Company, Inc.*, 492 F.2d 13, 16 (3rd Cir. 1974). Circumstances may exist where, notwithstanding plaintiff's failure to comply with the letter of the law, the purpose of the statutory requirement—providing the Secretary of Labor with an opportunity to conciliate while the complaint is fresh and giving early notice to the employer of possible litigation—have been substantially served. And cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. See generally, Comment, *Procedural Prerequisites to Private Suit Under the Act Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457 (1977).

Because we construe the 180-day requirement to be in the nature of a statute of limitations, we conclude that the granting of summary judgment was improper. The affidavits before the district court on Dresser's motion state facts which give rise to a disputed issue of tolling or estoppel. Plaintiff's post-termination reaction was an attempt to secure alternative employment with the company. The letter he received in January from the company's president was optimistic in this regard. The limitations period may have been tolled while Bonham was actively pursuing this attempt amicably to resolve his employment situation and while the company was sending positive signals.[6]

Furthermore, Bonham maintained before the district court that he was unaware of the rights conferred upon him by the ADEA until some time after December. He stated, by way of affidavit, that Dresser never posted any signs on its premises advising employees of the existence of the Act, or at least that he never saw any posted.

Title 29 U.S.C. §627 provides:

> Every employer ... shall post and keep posted ... upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

Such notice is to be posted in prominent and accessible places where it can readily be observed by employees. 29 C.F.R. §850.10 (1976). The posting requirement was undoubtedly created because Congress recognized that the very persons protected by the Act might be unaware of its existence. Failure to post the required notice will toll the running of the 180-day period, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the Age Discrimination in

[6] An employer's records and correspondence, while not dispositive of the date of unlawful termination, may be relied upon by an employee to estop the employer from asserting the defense of an untimely notice of intent to sue.

Employment Act. See *Bishop v. Jelleff Associates, Inc.*, 7 FEP Cas. 510 (D. D.C. 1974). *Cf., Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975); *Skoglund v. Singer Co.*, 13 FEP Cas. 253 (D. N.H. 1975); *McCrickard v. Acme Visible Records, Inc.*, 13 FEP Cas. 822 (W.D. Va. 1976). Any other result would place a duty upon the employer to comply without penalty for breach, and would grant to the employee a right to be informed without redress for violation.[7]

On these issues of tolling or equitable modification, questions of fact arise which must be determined by the district court in the first instance. We hold only that the employee is to be given an opportunity to demonstrate the existence of any equitable factors which may have a bearing on the operation of the 180-day statute of limitations.

Dresser argues that remand is nevertheless unnecessary. Citing *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), it contends that even if the 180-day notice period cannot be deemed to have run as of June 16, 1976. summary judgment must nevertheless be granted in its favor because Bonham failed to file a timely statutory notice with the Pennsylvania Commission on Human Relations. In *Goger*, this Court held that §633(b) requires an aggrieved individual initially to seek redress from the state agency before instituting suit in federal court. See also *McGarvey v. Merck & Co.*, 359 F. Supp. 525 (D. N.J. 1973), *vacated without published opinion*, 493 F.2d 1401 (3rd Cir.), *cert. denied*, 419 U.S. 836 (1974); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 844 (3rd Cir. 1977), *petition for cert. filed*,

[7]If the employer complied with the relevant posting regulations, an employee's assertion that he never saw any notices should not of itself require tolling of the 180-day period in which to file a notice of intent to sue.

46 U.S.L.W. 3108 (U.S. Aug. 30, 1977). Both the *Rogers* and *Goger* courts examined equitable considerations and decided that, on the facts of those cases, the procedural default would not foreclose suit. Failure to go to the state first was not treated as a jurisdictional bar.

The Pennsylvania Human Relations Act, Pa. Stat. Ann. tit. 43, §§951, *et seq.* (Purdon), is a law "prohibiting discrimination in employment because of age and establishing... a State authority to grant or seek relief from such discriminatory practice" within the meaning of §633(b). See *Sutherland v. SKF Industries*, 419 F. Supp. 610 (E.D. Pa. 1976); *McGinley v. Burroughs*, 407 F. Supp. 903 (E.D. Pa. 1975). Under the Pennsylvania statute, however, an aggrieved individual must file his administrative complaint within only 90 days after the alleged act of discrimination. Pa. Stat. Ann. tit. 43 §959 (Purdon Supp. 1977). In Bonham's case, the Pennsylvania Human Relations Commission deemed Bonham's June 16 notice untimely, and the agency declined to take jurisdiction.

We do not think that it was the intent of Congress to allow states to shrink the federal remedy for age discrimination by imposing limitation periods shorter than the federal ones. If compliance with Pennsylvania's 90-day filing period is deemed a jurisdictional condition precedent to suit under the ADEA, the federal 180-day limitations period becomes 90 days for residents of Pennsylvania, and the availability of the federal remedy is seriously undermined. *Cf. Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975) (Title VII). Moreover, any equitable grounds for relaxing the federal limitations period would evaporate if not recognized by the state.

We do not hold that the mere existence of a state limitations period which is shorter than the federal one relieves a plaintiff of his obligation to bring his complaint to

the attention of the state authorities. Rather, we hold only that if plaintiff files his complaint with the state agency within the federal 180-day period, the state's conclusion that the filing is untimely under state law will not bar the federal suit.[8] We think this rule is in accord with Congressional intention, consistent with *Goger* and *Rogers*, and compelled by our conclusion that the federal 180-day requirement is itself in the nature of a statute of limitations and subject to equitable modification.

We affirm the grant of summary judgment in favor of Dresser on Count II of the complaint. The district court ruled that Bonham's oral contract of employment was terminable at will by either party. However, in reliance on *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975), the court held that, under Pennsylvania law, termination of a contract at will for a reason contrary to public policy gives rise to a claim for breach of contract. The district court recognized that the Pennsylvania age discrimination statutes establish that a discriminatory discharge offends the state's public policy and that a state common law claim would lie if Bonham could prove age discrimination, but ruled against Bonham on the ground that the record failed to establish that a younger person was hired to replace him.

We do not believe that a complaint of age discrimination will always require proof that the discharged person was replaced by a younger employee; it is enough that he was discharged because of his age. Nor do we think that the record before the district court, before any discovery had been conducted, would permit summary judgment

[8]After a complainant initiates state administrative proceedings, he must wait at least 60 days, unless the proceedings are terminated earlier, before bringing suit in federal court. 29 U.S.C. §633(b). This 60-day period may run concurrently with the 60-day period afforded the Secretary of Labor to attempt conciliation.

predicated on a factual finding that Bonham had not been the subject of age discrimination.

Moreover, we do not believe that *McGinley* accurately states the law of Pennsylvania. The *McGinley* court failed to consider the Pennsylvania Supreme Court's ruling in *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974). In *Geary*, Pennsylvania's highest court discussed circumstances under which a discharge arguably in violation of public policy would give rise to a breach of contract claim where the plaintiff was hired under an at-will contract of employment. Plaintiff in that case, a salesman, called to management's attention his belief that a new product which the company was marketing had not been adequately tested and posed a serious danger to potential users. As a result of Geary's efforts, the product was re-evaluated and withdrawn from the market, but Geary was summarily discharged. He filed suit claiming that his termination was in violation of public policy and thus gave rise to a cause of action for breach of contract. A majority of the court rejected his claim on the grounds that the public policy considerations were not clear, and that the record disclosed a legitimate reason for the company's termination. The court, however, indicated that the result might be different if the mandates of public policy were clear and compelling or the termination violated a statutory duty imposed on the employer.

In the instant case, Pennsylvania's public policy on the question of arbitrary age discrimination is manifest. A termination based on age would violate the duties imposed on employers by the Pennsylvania Human Relations Act and would trigger the remedies provided by that act. We conclude that the Pennsylvania courts would not hold that termination of an at-will employee on the basis of age gives rise to an independent common law cause of action for

breach of contract in addition to those statutory remedies. We do not believe that the courts of Pennsylvania would hold that the mere passage of the Human Relations Act created a separate common law claim where none had existed before, and where that void had been filled by that very legislation. Judicial reluctance to create such a remedy is evident in *Geary*, and we believe that the courts of Pennsylvania, if directly confronted with the issue, would hold that the Pennsylvania Human Relations Act and the procedures established therein provide the exclusive state remedy for vindication of the right to be free from discrimination based on age.[9]

Accordingly, we affirm the grant of summary judgment on Count II of the complaint. We remand Count I for further proceedings on the question of tolling or equitable modification consistent with the views expressed here.

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[9]Section 962(b) of the Pennsylvania Human Relations Act, as amended, Pa. Stat. Ann. tit. 43, §902(b) (Purdon Supp. 1977), provides that "as to acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, [except as provided in subsection (c)] civil or criminal, based on the same grievance of the complainant concerned." Section 962(c) permits a complainant under certain circumstances to bring an action in the state courts of common pleas "based on the right to freedom from discrimination granted by this act." Thus, the Pennsylvania Supreme Court in other contexts has construed these remedy provisions as exclusive state law remedies once invoked by a complainant. *See Commonwealth Human Rel. Comm'n v. Feeser*, 469 Pa. 173, 178-179, 364 A.2d 1324, 1326-1327 (1976); *Daly v. School Dist. of Darby Township*, 434 Pa. 286, 289-290, 252 A.2d 638 (1969).

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 77-1292

EMRA JOSEPH BONHAM,
Appellant

v.

DRESSER INDUSTRIES, INC.,
A Corporation

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges*, and STERN, *District Judge*

The petition for rehearing filed by

DRESSER INDUSTRIES, INC., *appellee*,

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

...../s/ MAX ROSENN.....
Judge

Dated: February 1, 1978

CERTIFICATE OF SERVICE

I, Donald E. Seymour, Esquire, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, in accordance with Rule 33(1) of the Rules of the Supreme Court of the United States, upon the Respondent by mailing three copies thereof to James R. Duffy, Esquire, 1531 Frick Building, Pittsburgh, Pennsylvania 15219, attorney for Respondent, by first class mail, postage prepaid, this 28th day of April, 1978.

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Counsel for Petitioner,
Dresser Industries, Inc.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1562

DRESSER INDUSTRIES, INC.,
Petitioner

v.

EMRA JOSEPH BONHAM,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES R. DUFFY
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Financial Press Corporation, Pittsburgh

TABLE OF CITATIONS

CASES

OTHER AUTHORITIES

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Supreme Court of the United States

OCTOBER TERM, 1977

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DRESSER INDUSTRIES, INC.,
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Respondent

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Respondent, Emra Joseph Bonham, respectfully prays that Petitioner's Petition for Writ of Certiorari be denied.

OPINIONS BELOW

The opinions below are appended to the Petitioner's Petition as Appendix A and Appendix B.

JURISDICTION

Jurisdiction of this Honorable Court is not contested.

STATUTE INVOLVED

The Statute involved is the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. and the pertinent portion of the Statute is set out in Petitioner's Petition.

QUESTION PRESENTED

Is there a conflict within the Circuits in the interpretation and application of the Notice of Intent to Sue

requirement of the Act (29 U.S.C. §621(d)) which has not been, but should be, settled by this Honorable Court.

STATEMENT OF THE CASE

Respondent Bonham filed an action on August 20, 1976 in the U.S. District Court for the Western District of Pennsylvania, alleging that the termination of his employment with Harbison-Walker Refractories, Division of Dresser Industries, Inc. violated the Age Discrimination Employment Act, 29 U.S.C. §621, et seq.

Respondent Bonham was 46 years of age on October 31, 1975 when he was advised by his superiors, employees of the Petitioner Dresser, that he would be terminated on December 31, 1975.

During the period between October 31, 1975 and December 31, 1975, Respondent Bonham continued to receive every indicia of employment including normal pay on normal schedule and maintenance of all fringe benefits. He believed himself to be an employee of Dresser during that period and did not believe that his termination was final until December 31, 1975.

Bonham endeavored after December 31, through correspondence with Dresser's President, to reverse his termination and obtain transfer employment within the Dresser organization.

The record reveals that on October 31 (and on December 31) Bonham was unaware of the ADEA and he has alleged no notice of the Act was given as required.

Respondent's statutory notices to the Federal and State authorities were given on June 16, 1976, within 180 days of December 31, 1975 and 229 days after October 31, 1975.

Petitioner Dresser moved to dismiss Count One of Bonham's Complaint alleging a lack of subject matter

jurisdiction because of failure to file timely notice with the Federal and State authorities under the Act's notice of intent to sue requirements.

The District Court determined the "illegal act" occurred on October 31, 1975 and granted Dresser's Motion to Dismiss, treating it as a Motion for Summary Judgment. Respondent appealed to the United States Circuit Court of Appeals for the Third Circuit which Court reversed the granting of Summary Judgment holding that the 180 day notice of intent to sue requirement was not strictly jurisdictional but was subject to tolling or other equitable modifications. The case was remanded to the District Court for determination of facts pertinent to the question of equitable modification of the 180 day notice requirement. Petitioner filed a Petition for Rehearing which was denied. The instant Petition to this Honorable Court then followed.

ARGUMENT IN OPPOSITION TO GRANTING THE REQUESTED WRIT

1. The Decision Below Is in Harmony with the Prior Decisions of the Third Circuit Court of Appeals and Is in Harmony with Decisions of Other Circuits on the Same Issue.

The Third Circuit Court of Appeals had, prior to its decision in this case, reviewed District Court decisions in three cases dealing with the notice requirements. In *Rogers v. Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977) and *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13 (3rd Cir. 1974), the Third Circuit, while using the term "jurisdictional" with reference to the notice requirement, in fact examined the equitable considerations and determined that procedural fault in complying with the notice requirement did not foreclose suit. In *McGarvey v. Merck and Co., Inc.*, 493 F.2d 1401 (3rd Cir.) the court vacated, without published opinion, the New Jersey District Court judgment

(359 F. Supp. 525 (D.N.J. 1973)) applying the strict jurisdictional measure. The opinion in the instant case is, therefore, contrary to Petitioner's suggestion, totally consonant with all of the Third Circuit's prior holdings on the "jurisdictional" nature of the notice requirement.

In addition, the Court of Appeals decision in the instant case is, contrary to the suggestion of the Petitioner, in harmony with each of the other Circuits ruling on this issue.

Petitioner has counseled this Court that the Fifth, Sixth and Eighth Circuits, "every . . . Circuit ruling on the issue", have found timely compliance with the notice provisions to be a "jurisdictional" prerequisite to the maintenance of a private action. Your Respondent suggests that Petitioner has misread those cases.

A close reading of those opinions from the Fifth Circuit cited by the Petitioner, when read with that Circuit's opinion in *Charlier v. S. C. Johnson & Sons, Inc.*, 556 F.2d 761 (5th Cir. 1977) clearly shows that the Fifth Circuit has approached the problem in a manner identical to the Third Circuit in the instant case.

The Sixth Circuit has acknowledged that in those decisions where the Court used the term "jurisdictional", it was used

> "in the loose sense that §626 (d)'s requirements are a condition precedent to suit in Federal Court and not in the strict sense that non-compliance deprives the District Court of power to hear the case." *Gabriele v. Chrysler Corporation*, 17 F.E.P. Cases 200 at Pg. 204, footnote 15 (6th Cir. 1978).

A similar finding of the non "jurisdictional" nature of the notice requirement may be fairly read in *Evans v. Oscar Mayer & Company*, 17 F.E.P. Cases 221 (8th Cir. 1978).

The unanimity of the Circuits on this question should properly lead this Court to deny the requested Writ of Certiorari.

2. The Present State of the Law and Legislative History Support the Decision Below in the Third Circuit Court of Appeals and Decisions Cited from the Other Circuits.

The Age Discrimination Employment Act was amended by Public Law 95-256, approved April 6, 1978.

In the Conference Report published to accompany H.R. 5383, the Conferees agreed that the "charge" (notice of intent to sue in the original Act) is

> "not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. See, e.g., *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976) affirmed by an evenly divided court, 98 S.Ct. 600 (1977); *Bonham v. Dresser Industries, Inc.*, 16 F.E.P. Cases 510 (3rd Cir. 1977); *Charlier v. S. C. Johnson & Sons, Inc.*, 556 F.2d 761 (5th Cir. 1977)."
>
> Conference Report No. 95-950 to accompany H.R. 5383 (March 14, 1978) Page 12.

It is thus abundantly clear that Congress endorses the rationale of the Third Circuit Court of Appeals and each of the other Circuits on the notice question.

While the amendments to the Act are prospective, by the terms of the Act, the Conference Committee's endorsement of the opinion below is clearly retroactive. The remedial and humanitarian nature of the ADEA would warrant retroactive application of the amendments under the rationale of this Court in *Bradley v. Richmond*, 416 U.S. 696 and *Court v. Ashe*, 422 U.S. 66.

CONCLUSION

For all of the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

JAMES R. DUFFY

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Counsel for Respondent,
Emra Joseph Bonham

CERTIFICATE OF SERVICE

I, JAMES R. DUFFY, ESQUIRE, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief in Opposition to Petition for Writ of Certiorari in accordance with Rule 33 (1) of the Rules of the Supreme Court of the United States, upon the Petitioner, by mailing three copies thereof to Donald E. Seymour, Esq., 1500 Oliver Building, Pittsburgh, PA 15222, Attorney for the Petitioner, by first class mail, postage prepaid, this 6th day of July, 1978.

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